

# Inspection Report No. OIG-INS-30-04-01

## Review of Merit Dismissal Procedures

UNITED STATES GOVERNMENT  
*National Labor Relations Board*  
Office of Inspector General

### Memorandum

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**To:** Richard Siegel  
Associate General Counsel

**From:** Jane E. Altenhofen  
Inspector General

**Subject:** Inspection Report No. OIG-INS-30-04-01: Review of Merit Dismissal Procedures

We initiated this inspection on August 4, 2003 to evaluate the process and basis for Regional Offices issuing merit dismissals and to evaluate trends. Although we could not accurately determine the number of merit dismissal cases in FY 2001 and FY 2002, our calculations show that merit dismissal activity appeared to increase significantly in FY 2003 after the issuance of a policy to add an abeyance period to the merit dismissal policy. The days from filing to issuing a merit dismissal remained constant (about 70 days), and the percentage of merit dismissal cases appealed rose from a low of 16 percent in FY 2002 to 29 percent in FY 2003. The Regions generally followed the guidance received from the Division of Operations-Management (Operations-Management) regarding the recording of merit dismissal cases in the Case Activity Tracking System (CATS). In 11 of 23 (48 percent) cases reviewed, the date of the abeyance letter was incorrectly entered into the dismissal letter date field.

### SCOPE

We interviewed personnel in Operations-Management. We reviewed the National Labor Relations Act (NLRA) and applicable guidance provided by the General Counsel (GC) and Operations-Management regarding the merit dismissal procedures and the recording of merit dismissals in CATS. We obtained the CATS database of merit dismissals issued in FY 2001, FY 2002, and FY 2003 (through July) from Operations-Management and compared trends for all three years. We also obtained a CATS database from ITB and ran queries to confirm that the databases obtained from Operations-Management reflected merit dismissal activity.

We conducted this review from August to October 2003. The review was conducted in accordance with the Quality Standards for Inspections issued by the President's Council on Integrity and Efficiency.

### BACKGROUND

Section 3(d) of the NLRA states that the GC "shall have final authority . . . in respect of the investigation of charges and issuance of complaints under section 10 . . . and in respect of the prosecution of such complaints before the Board . . . ." The GC put this "prosecutorial discretion" into practice in GC Memorandum 95-15, *Lightening the Regional Office Workload* (August 22, 1995), which introduced the merit dismissal procedure. The merit dismissal procedure was to be used for cases with minor or technical violations of the Act in which there are no prior meritorious unfair labor practices charges within the past several years and in which:

1. The conduct is isolated in nature, there is no ongoing unlawful effect on an employee's terms and conditions of employment; and, there is neither impact on other employees nor accompanying

violations which require a board remedy;

2. The conduct has minor group impact; or

3. The conduct is of limited duration.

If the above criteria are met, the Regional Director could issue a dismissal letter stating that sufficient evidence exists to issue a complaint, but explaining why the Regional Director has decided not to proceed. The dismissal should be conditioned on no further unfair labor practices for a 6-month period such that if the condition is violated, the dismissal could be rescinded. Memorandum OM 01-76, Merit Dismissals (July 20, 2001), clarified that the 6-month period begins on the date of the alleged unfair labor practice to conform to the principles in *Ducane Heating Corp.*, 273 NLRB 1389 (1985), regarding the reinstatement of dismissed charges.

In many cases, little of the 6-month period from the date of the unfair labor practice remained after a merit dismissal was issued. The GC believed that this was a disincentive to the use of merit dismissals and that it was not beneficial to the Agency or the public. The GC, therefore, amended the procedure in GC Memorandum 02-08, Revised Procedure for Merit Dismissals (September 18, 2002). Under the new procedure, the Regional Director would issue a letter stating that the charge would be held in abeyance for 6 months from the date of the abeyance letter. The letter would further state that if, within a 6-month period, the Charged Party is not alleged in a new meritorious charge, the Region would then issue a second letter dismissing the case.

## **MERIT DISMISSAL STATISTICS**

Based on our review, the number of Regional Offices using merit dismissals and the number of merit dismissal cases appear to have increased significantly since the issuance of GC Memorandum 02-08. The median days from filing to dismissal or abeyance stayed constant (about 70 days) throughout the three fiscal years. The number of appeals as a percentage of merit dismissal cases rose from a low of 16 percent in FY 2002 to 29 percent in FY 2003. These statistics are summarized in Attachment 1 and Attachment 2.

### **FY 2001 and FY 2002**

For at least 45 cases, in 10 Regions, in FY 2001 and 62 cases, in 15 regions, in FY 2002 merit dismissals were issued. Of the 62 cases in FY 2002, 54 cases occurred prior to the issuance of GC Memorandum 02-08, and 8 occurred after the issuance. Two Regions (Region 1 - Boston and Region 9 - Cincinnati) accounted for over 64 percent of the cases in FY 2001 and 45 percent of the cases in FY 2002. The median days between the filing date and the date of the dismissal letter was 70 days in both years. Eleven cases (24 percent) in FY 2001 and 10 cases (16 percent) in FY 2002 were appealed. One appeal was granted in FY 2001 and no appeals were granted in FY 2002.

Operations-Management stated that prior to the issuance of GC Memorandum 02-08, tracking merit dismissal cases was not a priority, so no guidance was issued to the Regions on how to account for merit dismissal cases in CATS, although some Regions recorded merit dismissal activity in the case notes. Operations-Management also stated that they did not perform reviews or surveys to count the number of merit dismissal cases. Therefore, unrecorded merit dismissal activity may have occurred, and the number of merit dismissal cases in FY 2001 and FY 2002 may be higher than reported above.

### **FY 2003 (through July)**

In October 2003, after the issuance of GC Memorandum 02-08, Operations-Management issued guidance to the Regions concerning the tracking of merit dismissal cases in CATS. Operations-Management stated that tracking merit dismissal cases became a priority because the Overage Report is now done in CATS, and since merit dismissal cases would exceed the impact analysis days, they would need to be tracked on the Overage Report as a merit dismissal.

We determined that 104 cases (in 23 regions) had merit dismissals issued in FY 2003 (through July). Three Regions had 31 percent of the merit dismissals. Region 16 - Fort Worth and Region 17 - Kansas City each had 11 merit dismissal cases, and Region 6 - Pittsburgh had 10 merit dismissal cases. The median days between the filing date and the date the case was put into abeyance was 72 days. Eleven merit dismissals were revoked. Thirty-one merit dismissal cases (29 percent) were appealed. Nine appeals were denied and 22 were not acted upon at the time of our review.

## CONSISTENCY OF DATA INPUT

After the issuance of GC Memorandum 02-08, Operations-Management provided guidance to the Regions regarding how to record merit dismissal cases in CATS. The instructions stated that if an allegation is dismissed with merit, the Region should enter a determination of merit, enter the date that the case was put into abeyance, and put a case note saying that the case was a merit dismissal. Additionally, after the abeyance period ends, the closing should be recorded like all other dismissals, which includes entering the date the case was closed into CATS. The Regions generally followed these instructions, but we identified some data inconsistent with the instructions. These data inconsistencies do not affect the Agency's performance statistics.

We examined how merit dismissals were entered into CATS in the 23 Regions with a representative case from each Region closed by merit dismissal after the issuance of GC Memorandum 02-08. Of the 23 cases examined, 4 cases did not have an allegation with a determination of merit in CATS and 3 cases did not have an abeyance date entered in CATS. In addition, the Regions had entered the date of the abeyance letter into the dismissal letter date field in 11 cases (48 percent). These Regions also recorded the dismissal letter date in the dismissal letter date field. As an Agency policy, cases are recorded as closed 14 days after the second date unless the dismissal was appealed. Because the case is not dismissed until after the 6-month abeyance period is finished, recording the abeyance date in the dismissal letter date field is technically not correct, but does not impact the Agency's performance measures because the closed date is used for those calculations. Recording the abeyance date in the dismissal letter date field, however, does not provide management the most accurate information to manage the merit dismissal program. On October 17, 2003, Operations-Management issued Memorandum OM 04-03, *CATS Data Entry for Merit Dismissals*, which clarifies the instructions for accounting for merit dismissal cases in CATS, including not recording the date of the abeyance letter in the dismissal letter date field.

Attachments

## ATTACHMENT 1

### MERIT DISMISSALS CASES BY REGION

	Merit Dismissal Cases FY 2001	Merit Dismissal Cases FY 2002 (Pre GC 02-08)	Merit Dismissal Cases FY 2002 (Post GC 02-08)	Merit Dismissal Cases FY 2002 (Total)	Merit Dismissal Cases FY 2002 (through July)
Region 1 - Boston	12	17	1	18	3
Region 2 - New York	0	0	0	0	1
Region 3 - Buffalo	3	5	0	5	8
Region 4 - Philadelphia	0	1	4	5	8

Region 5 - Baltimore	0	0	0	0	1
Region 6 - Pittsburgh	1	0	0	0	10
Region 7 - Detroit	0	0	0	0	0
Region 8 - Cleveland	0	0	0	0	0
Region 9 - Cincinnati	17	10	0	10	6
Region 10 - Atlanta	0	0	0	0	0
Region 11 - Winston-Salem	0	0	0	0	0
Region 12 - Tampa	0	0	0	0	2
Region 13 - Chicago	0	0	0	0	0
Region 14 - St. Louis (including SR 33 - Peoria)	0	1	0	1	0
Region 15 - New Orleans	0	0	1	1	0
Region 16 - Fort Worth	0	1	0	1	11
Region 17 - Kansas City	1	0	0	0	11
Region 18 - Minneapolis	1	0	0	0	1
Region 19 - Seattle (including SR 36 - Portland)	0	1	0	1	9
Region 20 - San Francisco (including SR 37 - Honolulu)	0	2	1	3	7
Region 21 - Los Angeles	3	1	0	1	4

Region 22 - Newark	0	0	0	0	0
Region 24 - Hato Rey, PR	0	0	0	0	1
Region 25 - Indianapolis	0	0	0	0	5
Region 26 - Memphis	0	2	0	2	1
Region 27 - Denver	2	3	1	4	3
Region 28 - Phoenix	0	1	0	1	3
Region 29 - Brooklyn	0	0	0	0	1
Region 30 - Milwaukee	2	4	0	4	4
Region 31 - Los Angeles	3	5	0	5	1
Region 32 - Oakland	0	0	0	0	3
Region 34 - Hartford	0	0	0	0	0
Total	45	54	8	62	104

## ATTACHMENT 2

### MERIT DISMISSALS SUMMARY STATISTICS

	Merit Dismissal Cases FY 2001	Merit Dismissal Cases FY 2002 (Pre GC 02-08)	Merit Dismissal Cases FY 2002 (Post GC 02-08)	Merit Dismissal Cases FY 2002 (Total)	Merit Dismissal Cases FY 2002 (through July)
Total regions	32	32	32	32	32
Regions with merit dismissal activity	10	14	5	15	23

Regions with no merit dismissal activity	22	18	27	17	9
Total merit dismissal cases	45	54	8	62	104
Merit dismissal cases appealed	11	9	1	10	31
Appeals denied	10	9	1	10	9
Appeals granted	1	0	0	0	0
Appeals not acted upon yet	0	0	0	0	22
Number of merit dismissals revoked <sup>1</sup>	NA	NA	4	NA	11
Median days - filing to dismissal letter	70	69	84	70	72

<sup>1</sup> Because of our concerns about data accuracy in CATS for merit dismissals before the issuance of GC Memorandum 02-08, we did not calculate this statistic for merit dismissal cases for FY 2001 and FY 2002.